

May 10, 2016

MAY 16 2016

*VIA CERTIFIED MAIL  
RETURN RECEIPT REQUESTED*

Asphalt Shingle Recyclers, LLC  
Attn: Joshua & Deborah Fookes  
5900 Coliseum Way  
Oakland, California 94621

Asphalt Shingle Recyclers, LLC  
Agent for Service of Process  
Joshua Fookes  
5900 Coliseum Way  
Oakland, California 94621

**Re: Notice of Violation and Intent to File Suit under the Clean Water Act**

Dear Mr. & Mrs. Fookes:

I am writing on behalf of San Francisco Baykeeper ("Baykeeper") to give notice that Baykeeper intends to file a civil action against the Asphalt Shingle Recyclers, LLC ("ASR") for violations of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* ("Clean Water Act" or "CWA") at the asphalt shingle recycling facility located at 5900 Coliseum Way in Oakland, California (the "Facility").

Baykeeper is a non-profit public benefit corporation organized under the laws of California, with its office in Oakland, California. Baykeeper's purpose is to protect and enhance the water quality and natural resources of San Francisco Bay, its tributaries, and other waters in the Bay Area, for the benefit of its ecosystems and communities. Baykeeper has over five thousand members who use and enjoy San Francisco Bay and other waters for various recreational, educational, and spiritual purposes. Baykeeper's members' use and enjoyment of these waters are negatively affected by the pollution caused by ASR's operations.

This letter addresses ASR's unlawful discharge of pollutants from the Facility via stormwater into San Francisco Bay. Specifically, Baykeeper's investigation of the Facility has uncovered significant, ongoing, and continuous violations of the CWA and the General Industrial Stormwater Permit issued by the State of California (NPDES General Permit No. CAS000001 [State Water Resources Control Board] Water Quality Order No. 92-12-DWQ, as amended by Order No. 97-03-DWQ ("1997 Permit") and by



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Order No. 2014-0057-DWQ (“2015 Permit”) (collectively, the “Industrial Stormwater Permit”).<sup>1</sup>

CWA section 505(b) requires that sixty (60) days prior to the initiation of a civil action under CWA section 505(a), a citizen must give notice of his or her intent to file suit. 33 U.S.C. § 1365(b). Notice must be given to the alleged violator, the U.S. Environmental Protection Agency (“EPA”), and the State in which the violations occur. As required by section 505(b), this Notice of Violation and Intent to File Suit provides notice to ASR of the violations that have occurred and which continue to occur at the Facility. After the expiration of sixty (60) days from the date of this Notice of Violation and Intent to File Suit, Baykeeper intends to file suit in federal court against ASR under CWA section 505(a) for the violations described more fully below.

During the 60-day notice period, Baykeeper is willing to discuss effective remedies for the violations noticed in this letter. We suggest that ASR contact us within the next twenty (20) days so that these discussions may be completed by the conclusion of the 60-day notice period. Please note that we do not intend to delay the filing of a complaint in federal court, even if discussions are continuing when the notice period ends.

## **I. THE LOCATION OF THE ALLEGED VIOLATIONS**

### **A. The Facility**

ASR operates an asphalt shingle recycling facility located at 5900 Coliseum Way in Oakland, California. At the Facility, ASR recycles asphalt shingles and other debris (i.e., concrete, fully cured asphalt, rock, brick, and other similar aggregates), fuels trucks and other vehicles, and operates a maintenance shop. Asphalt shingles are ground up using heavy machinery and the resulting material is added to pavement mixtures to make roads. Potential pollutants include total suspended solids (“TSS”), poly aromatic hydrocarbons (“PAHs”), pH, heavy metals, oil and grease, hydrocarbons, waste motor and lube oils, waste antifreeze, and other pollutants. Stormwater from the Facility discharges to East Creek Slough via a ditch to the north of the property’s perimeter, which drains to San Leandro Bay.

### **B. The Affected Water**

San Leandro Bay is a water of the United States. The CWA requires that water bodies such as San Leandro Bay meet water quality objectives that protect specific “beneficial uses.” The beneficial uses of San Leandro Bay and its tributaries include commercial and sport fishing, estuarine habitat, fish migration, navigation, preservation of rare and endangered species, water contact and non-contact recreation, and wildlife

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<sup>1</sup> On April 1, 2014, the State Water Resources Control Board adopted the 2015 Permit. As of July 1, 2015, the 2015 Permit superseded the 1997 Permit except for the purpose of enforcing violations of the 1997 Permit. 2015 Permit, Section I.A. (Finding 6).

habitat. Contaminated stormwater from the Facility adversely affects the water quality of the San Leandro Bay watershed and threatens the beneficial uses and ecosystem of this watershed, which includes habitat for threatened and endangered species.

## **II. THE FACILITY'S VIOLATIONS OF THE CLEAN WATER ACT**

It is unlawful to discharge pollutants to waters of the United States, such as San Leandro Bay and its tributaries, without an NPDES permit or in violation of the terms and conditions of an NPDES permit. CWA § 301(a), 33 U.S.C. § 1311(a); *see also* CWA § 402(p), 33 U.S.C. § 1342(p) (requiring NPDES permit issuance for the discharge of stormwater associated with industrial activities). The Industrial Stormwater Permit authorizes certain discharges of stormwater, conditioned on compliance with its terms.

On or around April 17, 2012, ASR submitted a Notice of Intent ("NOI") to be authorized to discharge stormwater from the Facility under the 1997 Permit. On or around June 23, 2015, ASR submitted an NOI to be authorized to discharge stormwater from the Facility under the 2015 Permit. However, information available to Baykeeper indicates that stormwater discharges from the Facility have violated several terms of the Industrial Stormwater Permit and the CWA. Apart from discharges that comply with the Industrial Stormwater Permit, the Facility lacks NPDES permit authorization for any other discharges of pollutants into waters of the United States.

### **A. Discharges in Excess of BAT/BCT Levels**

The Effluent Limitations of the Industrial Stormwater Permit prohibit the discharge of pollutants from the Facility in concentrations above the level commensurate with the application of best available technology economically achievable ("BAT") for toxic pollutants<sup>2</sup> and best conventional pollutant control technology ("BCT") for conventional pollutants.<sup>3</sup> 1997 Permit, Order Part B.3.; 2015 Permit, Section X.H. EPA has published Benchmark values set at the maximum pollutant concentration levels present if an industrial facility is employing BAT and BCT, as listed in Attachment 1 to this letter.<sup>4</sup> The 2015 Permit incorporates these Benchmark values as "Numeric Action Levels." 2015 Permit, Section I.M. (Finding 62).

ASR's self-reported exceedances of Benchmark values over the last four (4) years, identified in Attachment 2 to this letter, indicate that ASR has failed and is failing to employ measures that constitute BAT and BCT in violation of the requirements of the

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<sup>2</sup> BAT is defined at 40 C.F.R. § 442.23. Toxic pollutants are listed at 40 C.F.R. § 401.15 and include copper, lead, and zinc, among others.

<sup>3</sup> BCT is defined at 40 C.F.R. § 442.22. Conventional pollutants are listed at 40 C.F.R. § 401.16 and include BOD, TSS, oil and grease, pH, and fecal coliform.

<sup>4</sup> The Benchmark values are part of EPA's Multi-Sector General Permit ("MSGP") and can be found at: <http://water.epa.gov/polwaste/npdes/stormwater/EPA-Multi-Sector-General-Permit-MSGP.cfm>. The most recent sector-specific Benchmarks can be found at: [http://water.epa.gov/polwaste/npdes/stormwater/upload/msgp2015\\_part8.pdf](http://water.epa.gov/polwaste/npdes/stormwater/upload/msgp2015_part8.pdf) ("2015 MSGP"). SIC Code 5093 is covered under Sector N in the 2015 MSGP.

Industrial Stormwater Permit. Baykeeper alleges and notifies ASR that its stormwater discharges from the Facility have consistently contained and continue to contain levels of pollutants that exceed Benchmark values for TSS.

ASR's ongoing discharges of stormwater containing levels of pollutants above EPA Benchmark values and BAT- and BCT-based levels of control also demonstrate that ASR has not developed and implemented sufficient Best Management Practices ("BMPs") at the Facility. Proper BMPs could include, but are not limited to, moving certain pollution-generating activities under cover or indoors, capturing and effectively filtering or otherwise treating all stormwater prior to discharge, frequent sweeping to reduce the build-up of pollutants on-site, installing filters in downspouts and storm drains, and other similar measures.

ASR's failure to develop and/or implement adequate pollution controls to meet BAT and BCT at the Facility violates and will continue to violate the CWA and the Industrial Stormwater Permit each and every day ASR discharges stormwater without meeting BAT/BCT. Baykeeper alleges that ASR has discharged stormwater containing excessive levels of pollutants from the Facility to San Francisco Bay during at least every significant local rain event over 0.1 inches in the last four (4) years.<sup>5</sup> Attachment 3 compiles all dates in the last four (4) years when a significant rain event occurred. ASR is subject to civil penalties for each violation of the Industrial Stormwater Permit and the CWA within the past four (4) years.

#### **B. Failure to Develop and Implement an Adequate Storm Water Pollution Prevention Plan**

The Industrial Stormwater Permit requires dischargers to develop and implement an adequate Storm Water Pollution Prevention Plan ("SWPPP"). 1997 Permit, Section A.1.a. and Order Part E.2.; 2015 Permit, Sections I.I. (Finding 54), X.B. The Industrial Stormwater Permit also requires dischargers to make all necessary revisions to existing SWPPPs promptly. 1997 Permit, Order Part E.2.; 2015 Permit, Section X.B.

The SWPPP must include, among other requirements, the following: a site map, a list of significant materials handled and stored at the site, a description and assessment of all potential pollutant sources, a description of the BMPs that will reduce or prevent pollutants in stormwater discharges, and specifications of BMPs designed to reduce pollutant discharge to BAT and BCT levels. 1997 Permit, Sections A.1-A.10.; 2015 Permit, Section X. Moreover, the Industrial Stormwater Permit requires dischargers to evaluate and revise SWPPPs to ensure they meet these minimum requirements, in particular, that the necessary BMPs are in place and being implemented. *See* 1997 Permit, Section A.9. (requiring a comprehensive site compliance evaluation completed each reporting year, and revisions to the SWPPP implemented within 90 days after the evaluation); 2015 Permit, Section X.D.2.a. (obligating the discharger to "ensure its

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<sup>5</sup> Significant local rain events are reflected in the rain gauge data available at: <http://www.ncdc.noaa.gov/cdo-web/search>.



SWPPP is developed, implemented and revised as necessary to be consistent with any applicable municipal, state, and federal requirements that pertain to the requirements in [the 2015 Permit].”). Additionally, the Industrial Stormwater Permit requires that ASR assess its stormwater sampling data and identify any additional parameters, beyond those explicitly required, that indicate the presence of pollutants in industrial stormwater. *See* 1997 Permit, Section Section B.5.c.ii.; 2015 Permit, Section X.G.2.d.

Based on information available to Baykeeper, ASR has failed to prepare and/or implement an adequate SWPPP and/or to revise the SWPPP to satisfy each of the requirements of the Industrial Stormwater Permit. For example, ASR’s past or current SWPPP does not include and/or ASR has not implemented adequate BMPs designed to reduce pollutant levels in discharges to BAT and BCT levels in accordance with the Industrial Stormwater Permit, as evidenced by the data in Attachment 2.

Accordingly, ASR has violated the CWA each and every day that it has failed to develop and/or implement an adequate SWPPP meeting all of the requirements of the Industrial Stormwater Permit, and ASR will continue to be in violation every day until it develops and implements an adequate SWPPP. ASR is subject to penalties for each violation of the Industrial Stormwater Permit and the CWA occurring within the past four (4) years.

#### **D. Failure to Properly Sample Stormwater Discharges**

ASR is also in violation of the Industrial Stormwater Permit because it has been collecting stormwater samples that do not adequately reflect pollution coming from its industrial activities. Section B.7.a. of the 1997 Permit required ASR to “collect samples of stormwater discharges from all drainage areas that represent the quality and quantity of the facility’s storm water discharges.” Section B.5.c.ii. of the 1997 Permit required facilities to sample for “[t]oxic chemicals and other pollutants that are likely to be present in storm water discharges in significant quantities.” Section B.5.c.iii. of the 1997 Permit and Section XI.B.6. of the 2015 Permit require facilities to sample for specific analytical parameters based on their standard industrial classification (“SIC”) code. For facilities that fall into SIC Code 5093, scrap and waste materials, these parameters are iron, lead, aluminum, zinc, and chemical oxygen demand. ASR self-classified the Facility under SIC code 5093, but has failed to consistently test its samples for these parameters and thus has failed to comply with Sections B.5.c. and B.7.a. of the 1997 Permit and Section XI.B.6. of the 2015 Permit.

Furthermore, the Industrial Stormwater Permit requires a minimum number of sampling events per wet season, with limited exceptions. 1997 Permit, Section B.5.; 2015 Permit, Section XI.B.2. Yet ASR has failed to sample and analyze at least two stormwater discharges from the Facility during any wet season over the past four (4) years. ASR reported taking only one sample during the 2012-2013 and 2014-2015 wet seasons, and zero samples during the 2011-2012 and 2013-2014 wet seasons.

As a result of ASR's failure to properly sample stormwater discharges from its Facility, ASR has been in daily and continuous violation of the Industrial Stormwater Permit and the CWA each and every day for the past four (4) years. These violations are ongoing. ASR will continue to be in violation of the sampling requirements each day that ASR fails to adequately develop and/or implement an effective sampling program at the Facility. ASR is subject to penalties for each violation of the Industrial Stormwater Permit and the CWA occurring for the last four (4) years.

#### **E. Unpermitted Discharges**

Section 301(a) of the CWA prohibits the discharge of any pollutant into waters of the United States unless the discharge is authorized by a NPDES permit issued pursuant to section 402 of the CWA. *See* 33 U.S.C. §§ 1311(a), 1342. ASR sought coverage for the Facility under the Industrial Stormwater Permit, which states that any discharge from an industrial facility not in compliance with the Industrial Stormwater Permit "must be either eliminated or permitted by a separate NPDES permit." 1997 Permit, Order Part A.1.; *see also* 2015 Permit, Sections I.A. (Finding 8) and I.C. (Finding 28).

ASR allows its wastewater from cleaning the grinding equipment to discharge off site. ASR does not have another NPDES permit authorizing these discharges. Because ASR has not obtained coverage under a separate NPDES permit and has failed to eliminate discharges not permitted by the Industrial Stormwater Permit, each and every discharge from the Facility described herein not in compliance with the Industrial Stormwater Permit has constituted and will continue to constitute a discharge without CWA permit coverage in violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).

#### **IV. PERSONS RESPONSIBLE FOR THE VIOLATIONS**

Asphalt Shingle Recyclers, LLC are the persons responsible for the violations at the Facility described above.

#### **V. NAME AND ADDRESS OF NOTICING PARTY**

San Francisco Baykeeper  
1736 Franklin Street, Suite 800  
Oakland, CA 94612  
(510) 735-9700

#### **VI. COUNSEL**

Baykeeper is represented by the following counsel in this matter, to whom all communications should be directed:

Nicole C. Sasaki, Associate Attorney  
George Torgun, Managing Attorney  
San Francisco Baykeeper

1736 Franklin Street, Suite 800  
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(510) 735-9700

Nicole C. Sasaki: (510) 735-9700 x110, [nicole@baykeeper.org](mailto:nicole@baykeeper.org)

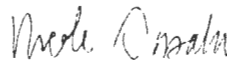
George Torgun: (510) 735-9700 x105, [george@baykeeper.org](mailto:george@baykeeper.org)

## VII. REMEDIES

Baykeeper intends, at the close of the 60-day notice period or thereafter, to file a citizen suit under CWA section 505(a) against ASR for the above-referenced violations. Baykeeper will seek declaratory and injunctive relief to prevent further CWA violations pursuant to CWA sections 505(a) and (d), 33 U.S.C. § 1365(a) and (d), and such other relief as permitted by law. In addition, Baykeeper will seek civil penalties pursuant to CWA section 309(d), 33 U.S.C. § 1319(d), and 40 C.F.R. § 19.4, against ASR in this action. The CWA imposes civil penalty liability of up to \$37,500 per day per violation for violations occurring after January 12, 2009. 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4. Baykeeper will seek to recover attorneys' fees, experts' fees, and costs in accordance with CWA section 505(d), 33 U.S.C. § 1365(d).

As noted above, Baykeeper is willing to meet with you during the 60-day notice period to discuss effective remedies for the violations noted in this letter. Please contact me or George Torgun to initiate these discussions.

Sincerely,



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Nicole C. Sasaki  
Associate Attorney  
San Francisco Baykeeper

Cc:

Gina McCarthy, Administrator  
U.S. Environmental Protection Agency  
Mail Code: 1101A  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

Alexis Strauss, Regional Deputy Administrator  
U.S. EPA, Region 9  
75 Hawthorne Street  
San Francisco, CA 94105

Bruce Wolfe, Executive Officer  
Regional Water Quality Control Board  
San Francisco Bay Region  
1515 Clay Street, Suite 1400  
Oakland, CA 94612

Thomas Howard, Executive Director  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814





**Attachment 1: EPA Benchmarks and  
Water Quality Standards for Discharges to Saltwater**

**A. EPA Benchmarks, 2000 and 2015  
Multi-Sector General Permit (“MSGP”)**

<b>Parameter</b>	<b>Units</b>	<b>Benchmark value</b>	<b>Source</b>
pH	SU	6.0 – 9.0	2015 MSGP
Total Suspended Solids	mg/L	100	2015 MSGP
Chemical Oxygen Demand	mg/L	120	2015 MSGP
Oil and Grease	mg/L	15	2000 MSGP
Aluminum Total	mg/L	0.75	2015 MSGP
Copper Total	mg/L	0.0048	2015 MSGP
Iron Total	mg/L	1.0	2015 MSGP
Lead Total	mg/L	0.21	2015 MSGP
Zinc Total	mg/L	0.09	2015 MSGP

## **Attachment 2: Table of Exceedances for Asphalt Shingle Recyclers, LLC**

Table containing each stormwater sampling result which exceeds EPA Benchmarks and/or causes or contributes to an exceedance of Basin Plan Water Quality Standards. The EPA Benchmarks and Basin Plan Water Quality Standards are listed in Attachment 1. All stormwater samples were reported by the Facility during the past four (4) years.

<b>Reporting Period</b>	<b>Sample Location</b>	<b>Sample Date</b>	<b>Parameter</b>	<b>Result</b>	<b>Unit</b>
2012-2013	Sample Point	11/28/2012	Total Suspended Solids	400	mg/L
2015-2016	Sample Point 2	12/3/2015	Total Suspended Solids	750	mg/L
2015-2016	Sample Point 1	12/10/2015	Total Suspended Solids	290	mg/L
2015-2016	Sample Point 1	1/13/2016	Total Suspended Solids	140	mg/L

**Attachment 3: Alleged Dates of Exceedances by  
Asphalt Shingle Recyclers, LLC,  
April 17, 2012 to May 10, 2016**

Days with precipitation one-tenth of an inch or greater, as reported by NOAA's National Climatic Data Center; Upper San Leandro Filters, California station, GHCND:USC00049185 when a stormwater discharge from the Facility is likely to have occurred. <http://www.ncdc.noaa.gov/cdo-web/search>

<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>
4/25	1/5	2/2	2/6	1/4
4/26	2/7	2/6	2/8	1/5
6/4	2/19	2/7	3/23	1/6
10/22	3/5	2/8	4/5	1/13
11/1	3/31	2/9	4/7	1/14
11/9	4/1	2/26	4/25	1/15
11/16	4/4	2/27	6/10	1/16
11/17	6/25	2/28	11/1	1/17
11/21	9/21	3/5	11/2	1/18
11/28	11/19	3/25	11/9	1/19
11/30	11/20	3/26	11/15	1/22
12/1	12/6	3/29	11/24	1/23
12/2	12/7	3/31	12/3	1/29
12/5		4/1	12/10	2/17
12/15		4/2	12/11	2/18
12/17		4/4	12/13	3/4
12/21		4/25	12/18	3/5
12/22		9/25	12/19	3/6
12/23		10/25	12/20	3/7
12/25		10/31	12/21	3/9
12/26		11/13	12/22	3/10
		11/19	12/24	3/11
		11/20		3/12
		11/22		3/13
		11/30		3/20
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